No. 20679

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

STEPHAN RIESS and THELMA McKINNEY RIESS,

Appellants,

vs.

C. W. MURCHISON and SIMI VALLEY DEVELOPMENT COMPANY,

Appellees.

APPELLEES' BRIEF.

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Jurisdictional Statement.

The jurisdiction of the United States District Court was derived from Title 28, United States Code, Section 1331(a)(1), in that there is diversity of citizenship, Appellants being citizens of California and Appellees of Texas and Delaware respectively. The amount in controversy, exclusive of interest and costs, exceeds the sum of ten thousand dollars ($10,000.00).

The complaint [Former C. T. 2-16][1] was filed October 8, 1958. The case was tried on a first amended complaint [Former C. T. 17-53], filed June 17, 1959, and the jurisdictional allegations appear in paragraphs I, II, III, and XVIII. Appellee Murchison filed his answer to the complaint on October 13, 1959 admitting

[1]"Former C. T." refers to the Clerk's Transcript of Record on the prior appeal to this Court, Number 18198.

the existence of diversity of citizenship [Former C. T. 70], and Appellee Simi Valley Development Company ("Simi Valley") filed its answer on January 6, 1960, also admitting diversity [Former C. T. 152]. A third party complaint premised upon an indemnity agreement was filed by Appellee Murchison on January 5, 1960 [Former C. T. 108-149], the allegations of which were admitted by answer filed by Appellee Simi Valley on January 6, 1960 [Former C. T. 150-151].

The jurisdiction of the District Court was further predicated upon the decision of this Court in the former appeal, Number 18198, which on March 17, 1964 reversed the judgment of the lower court and remanded the case "with directions to take such further proceedings as are consistent with the views expressed in this Opinion." 329 F. 2d 635, 644.

The jurisdiction of this Court is believed to derive from Title 28, United States Code, Section 1292(b), in that on April 11, 1966, the District Court declared that the Order in question involved a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order may materially advance the ultimate termination of the litigation [C. T. 221-222],[2] and on May 11, 1966, this Court permitted an appeal to be taken from such Order.

Statement of the Case.

This is the second appeal taken in this case. It follows from an interlocutory order of the District Court granting Appellees' motions for arbitration and staying proceedings pending arbitration.

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[2]C. T. refers to Clerk's Transcript of Record on this appeal, Number 20679.

In the prior appeal, Number 18198, the operative facts were carefully summarized by this Court and because of their relevancy to the question at hand, we take the liberty of quoting from the Court's Opinion [329 F. 2d at 637-639]:

> "Stephan Riess and Thelma McKinney Riess (referred to herein as the sellers) entered into a contract with C. W. Murchison, who subsequently assigned to Simi Valley Development Company (referred to herein as the buyers) for the sale of certain real estate, namely: A three and one-half acre parcel of land in the Simi Valley in Ventura County, California, on which were located a number of wells (referred to herein as the water lands) and, in addition, approximately three hundred subdivided lots in the same area (referred to herein as the additional lands).
>
> The contract consisted of two separate letters from C. W. Murchison to Stephan Riess, dated September 13, 1955, and June 12, 1956, constituting a single integrated agreement, under which: (1) The sellers were to convey the water lands and the additional lands to the buyers on June 12, 1956, (referred to herein as the consummation date). (2) The buyers were to deliver one-sixth of the common stock of the Simi Valley Development Company to the buyers on the consummation date. (3) The buyers were to pay the sellers $1,000,000 as follows: $50,000 was to be paid on the consummation date. $24,000 was to be paid in each of the two years immediately following the consummation date. No fixed time was set for payment of the balance; it was to be paid at the

rate of ten cents per 1,000 gallons of water produced, saved, and sold from the water lands, provided, however, that if during any year the amount payable at this rate should be less than $24,000, the sellers were to be entitled to take the difference in water at the rate of twenty cents per 1,000 gallons, though if the buyers should elect to pay the difference in money, they might do so. (4) 'Subject to' the physical ability of the water on the water lands to adequately service certain other lands which were owned by the buyers and which were to be developed for residential and commercial uses (referred to herein as the Montgomery lands), the buyers were to build or install a reservoir and pipelines on the water lands to transmit water taken therefrom to the nearest boundaries of the Montgomery lands by June 12, 1958. *In case of a disagreement as to the sufficiency of the water on the water lands to adequately service the Montgomery lands, the question was to be submitted to arbitration.* (5) The buyers were to have the right at any time to reconvey the water lands to the sellers and terminate the contract and their future obligations thereunder, if, in their opinion, the water on the water lands should no longer be capable of producing water in quantities sufficient to be commercially profitable to them.

Pursuant to the contract the sellers conveyed the water lands and the additional lands to the buyers on the consummation date. They have performed all the material covenants and conditions on their side of the contract.

During the fourteen months prior to the consummation date, the buyers paid the sellers $28,000 in fourteen monthly installments of $2,000 each (referred to herein as the voluntary payments). The contract recites that this amount should be a 'credit on the purchase price.' On or about the consummation date, the buyers paid an additional $50,000 to the sellers, and they delivered one-sixth of the common stock of Simi Valley Development Company to the sellers.

During the fifteen months immediately following the consummation date, the buyers paid the sellers $30,000 in fifteen monthly installments of $2,000 each. Thereafter, the buyers refused to make any further monthly payments, contending that the voluntary payments ($28,000) should be credited against the balance due for the last nine months of the first two year period ($18,000), thereby satisfying such balance and creating an overpayment of $10,000.

Subsequently, during certain meetings between the sellers and the buyers, and in certain correspondence and conversations between them, concerning future performance by the buyers under the contract, the buyers expressed some unwillingness to comply exactly with the terms of the contract. Whether the buyers actually repudiated the contract is in dispute.

The buyers did not build or install the reservoir and pipelines on the water lands by June 12, 1958, as promised, though they did build and install them at a later date before trial. They asserted that the water on the water lands was insufficient

to adequately service the Montgomery lands and that, therefore, the condition to their duty to build or install the reservoir and pipelines by that date did not occur.

The buyers have not paid the sellers at the contract rate for water produced, saved, and sold by them from the water lands, though between the consummation date and the date of trial they did produce, save, and sell water therefrom.

The buyers have never exercised their right under the contract to terminate the contract for insufficiency of the water on the water lands.

On October 8, 1958, the sellers brought the present action in the District Court. They demanded a jury trial. At trial they proceeded on the theory that the buyers committed total breach of the contract by failing to perform their duties thereunder and by unequivocally repudiating such duties.

Before and during the trial, the buyers sought to enforce the contract's arbitration clause. They made a number of motions to stay the proceedings pending arbitration of the question of the sufficiency of the water on the water lands to adequately service the Montgomery lands. The District Court denied such motions on the ground that the question of sufficiency was not material to the case." (Emphasis added).

After reciting the above facts, this Court ruled, in part, that the District Court erred in holding the buyers' duty to build or install the reservoir and pipelines by June 12, 1958, was absolute and unconditional regard-

less of the sufficiency of the water. The Court stated at 644:

> "Under our holding above, the sufficiency of the water on the water lands to adequately service the Montgomery lands is quite material to the case. Therefore, *we further hold that the District Court's denial of the buyers' motions for arbitration, on the ground that the question of sufficiency was immaterial, was erroneous.* If *the present case is one which is otherwise proper for arbitration the buyers are entitled to have the question of sufficiency settled by arbitration. Whether it is such a case must be determined on the facts relative to the buyers' conduct.* . . . And the determination must be governed by the pertinent California cases and statutes, for the contract is not one involving commerce . . . and the question relates to performance and discharge and, therefore, under the pertinent authorities is governed by the substantive law of California, the place of performance. . . .
>
> The Judgment is reversed and the case is remanded to the District Court with directions to take such further proceedings as are consistent with the views expressed in this Opinion." (Citations omitted) (Emphasis added).

Pursuant to the above directive and remand, Appellees again requested the trial court to refer the matter to arbitration [See, *e.g.,* Memorandum of June 12, 1964, reproduced in part, C. T. 26-34], and when Appellants filed a third amended complaint [C. T. 2], Appellees moved for a stay [C. T. 22-36]. Hearings followed on March 8, 9, 10, 11, 16, 17, and 23, June 7, 8, and 9,

and November 8, 1965 [R. T. 1-731],[3] concerning the propriety of arbitration, at the conclusion of which the District Court granted Appellees' motion.[4]

The Order, from which this appeal is taken, provides in pertinent part as follows:

> ". . . and it further appearing . . . that defendant and third party plaintiff C. W. MURCHISON, and third party defendant SIMI VALLEY DEVELOPMENT COMPANY, *duly and timely moved the Court for its order staying proceedings* pending arbitration of said issue, and that defendant and third party plaintiff MURCHISON, and third party defendant SIMI VALLEY DEVELOPMENT COMPANY are not, and that *neither of them is, in default or otherwise precluded from proceeding with arbitration*, and that the present case is one which is otherwise proper for arbitration, and the Court having considered all of the records and files of the above entitled cause, the evidence submitted, the memoranda and arguments of counsel, and the Court being fully advised, and good cause appearing therefor, IT IS ORDERED:
>
> 1. That the parties proceed to arbitration of the issues. . . .
>
> * * *
>
> 3. All proceedings in the above entitled cause are stayed pending the decision of the arbitrators." [C. T. 193, line 18, to 194, line 1; 195, lines 2 and 3] (Emphasis added).

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[3]"R. T." refers to Reporter's Transcript of Record on this appeal.

[4]The filing date of October 14, 1965 stamped on the Order [C. T. 192] appears in error, since it was not until November 8, 1965, that the lower court stated it would sign and file the Order [R. T. 729, line 25, to 730, line 2, 731, lines 10-11].

This Order culminated the long-standing efforts on the part of Appellees to obtain arbitration of the dispute in accordance with the terms of the contract. Since the commencement of this action, Appellees have consistently demanded arbitration, and Appellants have opposed it. In this connection, the Court's attention is invited to the numerous requests appearing in just the Clerk's Transcript on the former appeal:

June 30, 1959—Simi Valley moved to dismiss or in the alternative for a stay of the action until Appellants complied with arbitration [Former C. T. 54-55].

August 31, 1959—C. W. Murchison moved for dismissal or stay of the action until Appellants complied with arbitration [Former C. T. 60-63].

October 13, 1959—C. W. Murchison in his answer raised the failure to arbitrate as a defense [Former C. T. 74].

October 26, 1959—C. W. Murchison moved for a stay of the proceedings pending arbitration [Former C. T. 77-78].

January 5, 1960—Both Appellees moved the District Court to reconsider its order denying their motion for a stay pending arbitration [Former C. T. 84-86].

January 6, 1960—Simi Valley in its answer raised the refusal to arbitrate as a defense [Former C. T. 156]

April 14, 1960—Both Appellees in their Memorandum of Contentions of Facts and Law requested that the dispute over water be submitted to arbitration [Former C. T. 184-188].

May 12, 1961—Simi Valley moved for a stay pending arbitration [Former C. T. 201-202].

May 12, 1961—C. W. Murchison moved for a stay pending arbitration [Former C. T. 211-212].

Significantly, Simi Valley had requested arbitration even prior to the commencement of this suit. In its letter of May 19, 1958, Appellee wrote as follows:

"Dear Mr. and Mrs. Riess:

At our meeting on May 14th you requested that I submit in writing a proposal for settling the problems in respect to the Simi Valley properties and the existing contract dated September 13, 1955, as amended by letter of June 12, 1956.

As stated to you at the meeting, Simi Valley Development Co. has made recent tests of wells under the supervision of competent engineers and had been advised that there is inadequate water to justify a development of all the properties covered by the aforesaid agreement. It would be an economical waste in their opinion to build reservoirs and pipelines to all the properties as required by the aforesaid agreement since there would be insufficient water to service the same.

The aforesaid agreements provide that the controversy may be disposed of by *arbitration*. They also provide that Simi Valley Development Co. may quitclaim to you the water lands and wells located thereon, and be relieved of future obligations, with the right to retain the personal property that was acquired from you by bill of sale.

The engineering reports indicate, and we are satisfied, that there is sufficient water to justify the building of reservoirs and pipelines to the commercial property, which is defined as the property lying south of Los Angeles Avenue. The Simi

> Valley Development Co. stands ready, able and willing to install the reservoir and pipelines to that area and the pumping facilities to deliver water to that area. Said installation will be commenced immediately in the event that you are willing to accept such an installation as compliance with the terms of the aforesaid agreement. If you are unwilling to accept the same as compliance, *we are then faced with the alternative of submitting the controversy to arbitration which Simi is willing to do upon receiving advice from you of your rejection and desire to arbitrate the matter and the designation, by you, if an arbitrator, as provided for in the aforesaid agreement.*" (Emphasis added) [C. T. 62; App. Ex. 14].

Appellants found the proposal unacceptable and instead of designating an arbitrator they brought suit in the District Court. There is no evidence in the record below that Appellees ever withdrew their offer to arbitrate nor do Appellants so contend. Appellants likewise do not claim that Appellees failed to assert their right to arbitration in a timely fashion. In this respect, note the following colloquy between the court and counsel for Appellants:

> "The Court: . . . in other words, Mr. Murchison from the very beginning of this case has demanded arbitration. Every time we have a hearing, he demands arbitration. The record is clear that he demands arbitration.
>
> Mr. Schwartz: That's right." [R. T. 558].

At the hearing below on the question of whether Appellees were entitled to arbitration, the following oc-

curred: Hal E. Marron, a water expert, was called as a witness on behalf of Appellees [R. T. 65]. Mr. Marron testified that he could render an expert opinion as to the amount of water necessary to service adequately the Montgomery lands, contemplating that such lands would be developed for residential and industrial usages [R. T. 68]. After explaining how he could arrive at this opinion, Mr. Marron testified that if given sufficient data, he could ascertain the capacity of the wells as of the year 1956 [R. T. 118-119]. This testimony was offered by Appellees in response to the District Court's inquiries as to whether it was possible to determine how much water was both necessary and available [R. T. 41-44, 128-130].

After Marron concluded, Appellant Stephen Riess was called as a witness by Appellants [R. T. 188]. Over Appellees' general objections of materiality, Mr. Reiss testified to such matters as his background in hydrology [R. T. 189], the nature of the land in question [R. T. 191], his development of the water resources on the land [R. T. 192-199], various tests he made on the wells [R. T. 197-198], tests made by Appellees [R. T. 206-209], the output of the wells [See *e.g.,* R. T. 228], the loss of Well No. 1 when the drill broke [R. T. 235-237], the deepening and capping of Well No. 3 by Appellees [R. T. 238-242], the failure of Appellees to complete Well No. 4 [R. T. 249-255], the substitution by Appellees of a 150 h.p. pump for the 350 h.p. pump on Well No. 2 [R. T. 416-419], the method used by Appellees in pumping water from Well No. 2 to certain alfalfa lands [R. T. 483], and various statements allegedly made by Appellees' representatives in 1957 and early 1958 indicating an unwill-

ingness to construct the reservoir or pipelines or develop the property unless Mr. and Mrs. Riess agreed *inter alia* to returning the Simi Valley stock, accepting one-half of the $18,000 in dispute, and limiting the extent of the pipelines [R. T. 311-314, 472-480, 495-496; C. T. 43; Brief for Appellants, pp. 17-19, 22-26].

Based on the above testimony by Mr. Riess, Appellants now claim that Appellees repudiated and abandoned their obligations under the contract and thereby lost their right to arbitration.

No evidence was presented below that Appellees ever refused to arbitrate or declared either the arbitration clause or the contract as a whole to be invalid or unenforceable. Nor was Mr. Riess able to show that he relied upon Appellees' statements to his detriment, or in any way changed his position because of them. In fact after the testimony the trial judge commented:

> "The Court: I know, Mr. Schwartz, but I gave you an opportunity to show there was estoppel. We had Mr. Riess upon the stand and he was on the stand for an entire day, if I recollect, and he didn't testify to anything on which an estoppel could be based. If I would hold there was an estoppel, it would mean the Circuit would reverse it and send it right back.
>
> * * *
>
> You have gone just as far as I want to hear, because Mr. Riess' testimony itself indicates there is no estoppel. He hasn't testified to one thing that Mr. Murchison did that he relied upon." [R. T. 546].

Finally the court concluded that there was no estoppel [R. T. 581].

It should also be observed that at the time the above statements were allegedly made to Mr. Riess, Appellees were claiming the water supply was inadequate and consequently they had no duty to install the reservoir and pipelines. According to Mr. Riess' testimony, Appellees stated they "were not obligated to drill and complete water wells." [C. T. 43]. Mr. Costin told him, "We have a report from engineers that claim there will be only about 300 gallons in a year from now and this is less water than we have got to keep for ourselves to keep the development going." [R. T. 476; See also letter of May 19, 1958, reprinted in part, *supra*].

In Mr. Costin's affidavit of November 5, 1959, he states:

> "It is untrue that no bona fide dispute exists as to the available water; that the controversy existing with the plaintiff is a failure to erect pipelines which the defendant claims they are not obligated under the agreement to do by reason of lack of water to service the entire 1,600 acres, that the available water is only sufficient to serve approximately 200 acres under the Ventura County requirement; that the agreement between plaintiff and defendant, Murchison, does not require partial performance and since there is insufficient water to serve the 1600 acres, there is no obligation on behalf of defendant to erect pipelines to service said acreage." [C. T. 83-84].

At the hearing on arbitration, there was no occasion for Appellees to cross-examine Mr. Riess in regard to the alleged repudiation of the contract by them or to call opposing witnesses, Appellees being of the view that Mr. Riess' testimony was immaterial [R. T. 578-79,

584, 649, 715], and the Court having indicated that it had heard enough [R. T. 546]. Furthermore, Mr. Riess' testimony largely echoed his testimony at the first trial in 1962 [Former R. T. 131-35, 145, 150][5] at which time he was in fact extensively cross-examined by Appellees [Former R. T. 206-52, 273-309, 344-406, 426-47, 456-59].

At the completion of the first trial in this case, the lower court found:

> "At no time, however, prior to or after the date of the consummation of the purchase of the lands from plaintiffs did defendants, or either of them, or anyone acting in their behalf, repudiate said agreement." [Former C. T. 355; see also Former R. T. 255, 418].

The foregoing constitutes generally a statement of the case and the facts relative to arbitration as they were before the District Court when it made its Order on November 8, 1965. We feel constrained at this point, however, because of certain things said in the statement of the case by Appellants, to make some additional comments on the evidence.

Appellants have stated that payment for the land, "except for some preliminary sums, has not yet been made" (Brief for Appellants, p. 3) and that "defendants have had the benefit of plaintiffs' land, without substantial payment." (Brief for Appellants, p. 1). These wholly irrelevant and somewhat inflammatory remarks are clearly incorrect. Under the terms of the

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[5]"Former R. T." refers to Reporter's Transcript of Record on the prior appeal.

contract, Appellees were obligated to pay unconditionally $98,000.00, in addition to turning over one-sixth of the stock of Simi Valley. Not only did Appellees comply with these terms, but paid Appellants an additional $10,000.00. $1,000,000.00 was the contractual ceiling on the cash purchase price and was payable *only* as water was produced, saved and sold. Appellees have always been willing to make such payments [See *e.g.,* Former C. T. 254-55; R. T. 426-27, 512-13]. At the former trial of this case, Appellees went so far as to stipulate for the purpose of that proceeding, that the amount owing was $25,000.00 [Former R. T. 491]. While Appellees were also obligated to supply certain amounts of water to Appellants upon written demand, no such demands have ever been made [Former R. T. 206; R. T. 374, 414-15]. This, however, was the alternative right given to Appellants by the contract, *i.e.,* there was no absolute entitlement to money absent production.

With respect to the so-called "benefits" of Appellants' land, the venture proved to be a bad one for Appellees: the expected water supply was not there and Appellees have had to bear the carrying charges on the land (amounting to $60,000.00 in 1959 alone [See Affidavit of Glen Costin, C. T. 84]).

Appellants seek, as though there were no contract, to convert Appellees' obligation to pay up to $1,000,000.00 as water is produced and sold into an absolute obligation to pay $1,000,000.00 without reference to production. Thus, even though Appellees were not obligated to produce any water, see Point IV *infra,* nor unconditionally to pay any part of the balance, Appellants now claim that because of an alleged breach or repudiation, Appellants are entitled to the entire $1,000,000.00.

Appellants have also asserted in their statement of the case that their evidence showed "repudiation and abandonment of the contract by the defendants." (Brief for Appellants, p. 7). This, of course, is purely argument on the part of Appellants and is controverted by Appellees. The issue has not been tried. See Points II and III, *infra.*

Appellees concur in Appellants' desire to bring this litigation to a close. So that the record is clear, however, we would point out that Appellees have consistently demanded and Appellants have consistently opposed arbitration under the terms of the contract. If arbitration had been held when first requested, we believe this suit would have terminated long ago. The delay is attributable to Appellants' unwillingness to see the controversy resolved in the manner provided in their contract, not because of any delay imposed upon them by Appellees.

Summary of Argument.

Appellants, both at the hearing below and now on appeal, have proceeded upon an erroneous theory of law, namely, that a party who breaches, repudiates or abandons his obligations of performance under a contract thereby forfeits his right to arbitration pursuant to the contract. As demonstrated in Point V *infra,* it is only when the arbitration clause itself is breached, repudiated or abandoned that the benefits of arbitration are lost. In the present case, since Appellees neither refused to arbitrate, abandoned the arbitration clause nor otherwise defaulted in proceeding with arbitration, they are entitled to arbitration, and the decision of the lower court must be affirmed.

We also respectfully submit that Appellants' claims of breach, repudiation and abandonment are premature, inasmuch as the duties which Appellees are claimed to have breached are conditional, as established in the prior decision in this case. Until the condition has been resolved to exist, *i.e.,* whether there is adequate water to service the Montgomery lands, the issue of breach cannot be considered. This argument is explored in Point II *infra.*

In addition, we have contended that assuming arguendo that Appellants' claims were not premature, nevertheless sufficient evidence of repudiation and abandonment was not presented to the lower court, Point III *infra,* and that Appellees were not under an implied duty to develop the water lands and to produce, save and sell water. Such implied duties, as explained in Point IV *infra,* would be contrary to the intent of the parties and the express covenants in the contract.

Specific responses are also directed to Appellants' contentions that the trial court erred in failing to limit the arbitration clause, Point I *infra;* that the District Court erred in failing to make findings of fact, Point VI *infra;* and that the District Court erred in concluding that Appellees were not in default, Point VII *infra.*

ARGUMENT.

I.

The Trial Court Properly Limited the Arbitration Clause.

In the first point of their brief, Appellants state that the arbitration clause of the contract is limited to the sufficiency of water as a prerequisite to Appellees' obligation to build reservoirs and pipelines (Brief for Appellants, pp. 10-14). This statement by Appellants being supported by the obvious wording of the contract, we have no dispute with it. Appellants go on to assert, however (at least in the point-heading), that the trial judge failed so to limit the arbitration clause. Here we must take issue.

No references to the transcript on appeal are made by Appellants in support of their argument, nor do they explain how the lower court erred. While a number of matters are cited in their brief which are not arbitrable, such as Murchison's right to reconvey the lands or whether or not there has been a repudiation, these matters were never referred to arbitration. The attention of the Court is invited to the wording of the Order, the best evidence opposing Appellants' claims:

> "That plaintiff on the one hand, and defendant and third party plaintiff MURCHISON and third party defendant SIMI VALLEY DEVELOPMENT COMPANY jointly on the other, are directed each to proceed to arbitration as soon as reasonably practicable, and to submit to the three arbitrators . . . the issues hereinafter set forth, such arbitrators . . . to render a written decision to the Court and to the parties upon the following two specific issues:

(a) How much water would have been necessary on June 12, 1958, on a continuous basis, to adequately service the lands covered by the Montgomery contract with an adequate supply of water, contemplating that such lands would be developed for residential and industrial usages;

(b) Whether, on June 12, 1958, the well or wells then or thereafter located on the water lands were physically able to produce water, or a continuous basis, in the quantity determined by the arbitrators to have been necessary pursuant to paragraph 2(a) hereof; . . ." [C. T. 194-195].

Thus, it would appear Appellants' statement is totally unsupported by the record below.

Appellants also refer to the fact, both in argument and in their statement of the case, that after the remand from this Court they filed a Third Amended Complaint which was based on "defendants' repudiation of the contract." (Brief for Appellants, pp. 4, 10). But the filing of this Complaint cannot affect Appellees' right to arbitration. Under the mandate of this Court arbitration was required unless waived by Appellees:

"Under our holding above, the sufficiency of the water on the water lands to adequately service the Montgomery lands is quite material to the case. . . . *If* the present case is one which is otherwise proper for arbitration the buyers are entitled to have the question of sufficiency settled by arbitration. Whether it is such a case must be determined on the facts relative to the buyers' conduct. . . .

> The Judgment is reversed and the case is remanded to the District Court with directions to take such further proceedings as are consistent with the views expressed in this Opinion." 329 F. 2d at 644.

Thus, the issues of this case cannot be altered by an amended complaint which is inconsistent with the judgment of this Court.

> See generally, *Jones v. St. Paul Fire & Marine Ins. Co.,* 108 F. 2d 123 (5th Cir. 1939);
>
> 3 Moore, *Federal Practice* ¶15.11, p. 970 (2d ed. 1966).

Arbitration is also required because the amended complaint, like the former ones, alleges as a breach the failure by Appellees to build and install the reservoir and pipelines by June 12, 1958 [C. T. 17]. There can have been no breach unless there was a duty, and whether or not there was a duty is dependent on the outcome of arbitration.

In addition, the fact that the Third Amended Complaint alleges repudiation of the contract does not affect Appellees' right to arbitration. Faced with just such an argument, the New York Court of Appeals answered it as follows:

> "To allow plaintiff to conclusorily frame the issue in terms of breach and repudiation, and thereby avoid arbitration, would render the instant arbitration agreement meaningless." *DeLillo Const. Co. v. Lizza & Sons, Inc.,* 7 N.Y. 2d 102, 164 N.E. 2d 95 (1959).

II.

Appellees Cannot Be Held to Have Repudiated or Abandoned the Contract Unless the Condition to Their Duty of Performance Occurred.

In seeking to overturn the Order below, Appellants are not claiming that Appellees lost their right to arbitration because they failed to assert it before the filing of suit, or failed to plead the arbitration clause as a defense. Indeed, as already noted, the evidence shows beyond question that Appellees promptly, diligently and continuously demanded arbitration. Nor do Appellants claim that the alleged statements made to them by Costin, Cobb, and Adams caused any detrimental reliance or change of position, with the result that Appellees should be estopped to assert the arbirtation clause. Nor did the Court find an estoppel on the facts [R. T. 546]. Rather, it is urged that Appellees as a matter of law repudiated and abandoned the contract, and by such actions lost the benefits of arbitration.

We might note at this juncture that Appellants are referring generally to the repudiation or abandonment of Appellees "obligations" or "performance" under the contract. More specifically, they are referring to such obligations as the construction of pipelines and reservoirs, the drilling and completion of wells, the development of the water lands, and the production and sale of water. By contrast, Appellants are not asserting that at any time Appellees repudiated the "existence" or "validity" of the contract. Compare *Bertero v. Superior Court*, 216 Cal. App. 2d 213, 30 Cal. Rptr. 719 (1963).

As noted later in this brief, Point V *infra*, Appellants have proceeded both in the lower court and now

on appeal upon an unacceptable theory, namely that a party who breaches or repudiates his duties of performance thereby forfeits his rights to arbitration. This is not the law; and unless the repudiation includes the arbitration clause itself, the court must grant arbitration to the repudiating party. Were the law otherwise, provisions for arbitration would invariably be rendered nugatory by the mere assertion of a breach on the part of the party seeking arbitration.

Assuming *arguendo* that Appellants' theory were correct, we respectfully submit that it cannot be applied in the instant case for the duties which Appellees are claimed to have repudiated and abandoned are *conditional,* as established in the prior decision, 329 F. 2d at 643-644. Unless the condition exists, a circumstance the parties left to determination by arbitration by their contract, there can be no repudiation or abandonment. When a condition of liability fails to occur, the liability does not arise.

Thackaberry v. Pennington, 131 Cal. App. 2d 286, 296-297, 280 P. 2d 165 (1955);

Van Norden v. Metson, 75 Cal. App. 2d 595, 598-599, 171 P. 2d 485 (1946);

Mineral Park Land Co. v. Howard, 172 Cal. 289, 15 Pac. 458 (1916);

Restatement of Contracts, §395;

6 Corbin on Contracts, §1252.

In *Thackaberry v. Pennington, supra,* the agreement required payments to be made to the plaintiff and to another, when the latter conveyed ninety lots to a third party. The ninety lots were never conveyed. In holding that the Trial Court had erred in awarding a judg-

ment for the plaintiff, the Court stated as follows at 297:

> "The parties agreed, not that McFadden and plaintiff should be paid in any event or on the conveyance of the 44 lots to Anaheim, but that they should be paid in connection with the construction of houses by Anaheim on the 90 lots. Any obligation to pay plaintiff was conditioned on the conveyance of the 90 lots to Anaheim. Since the condition did not eventuate, the obligation did not accrue."

In *Van Norden v. Metson, supra,* the agreement provided that plaintiff should be entitled to payment after the completion of an arbitration. The arbitration never took place, although the plaintiff did perform services by way of preparation for the proceeding. In holding for the defendant, the Court stated at 598-99:

> "It is elementary that where a payment is agreed to be made on the occurrence of a future event and, through no fault of the promisor, the event does not occur there can be no recovery on the promise." (Citations).

The Restatement of Contracts, volume 2, sections 395, 396, states the rule to be as follows:

> "§395. When Failure of a Condition to Occur Discharges a Duty.
>
> *"A contractual duty is discharged by the unexcused failure of a condition to occur within the time necessary to create a right to the immediate performance of the duty.* Comment:
>
> a. Sections 250-325 (Chapters 10, 11), state the rules governing the requirements for a duty of

immediate performance. A conditional right to performance arises as soon as the contract is made, but the duty does not mature or become one of immediate performance until later. The condition must first occur, and the terms of the contract may require it to occur at a particular time or within a limited period. When a duty is thus conditional, and the seasonable occurrence of the event becomes impossible without excuse, the duty is necessarily discharged." (Emphasis added.)

Professor Corbin's statement of the rule is as follows (6 Corbin on Contracts, §1252):

"§1252. Discharge of Duty by Nonperformance of a Condition.

"When a contractual duty is subject to a condition precedent, whether that condition is express, implied, or constructive, there is no duty of immediate performance and there can be no breach of that contractual duty by mere nonperformance, unless the condition precedent is either performed or excused. If such a condition precedent is neither performed nor excused within the time that is required, such failure now makes it impossible for a breach of contract to occur. Nonperformance of the primary contractual duty can now never operate as a breach of it; and no remedy for enforcement will ever be available. Therefore, the contractual duty must be regarded as discharged."

In *Mineral Park Land Co. v. Howard, supra* at 292, the California Supreme Court noted:

"It is, however, equally well settled that where performance depends upon the existence of a giv-

> en thing, and such existence was assumed as the basis of the agreement, performance is excused to the extent that the thing ceases to exist or turns out to be non-existent."

The duty to install and construct the reservoir and pipelines, under the terms of the agreement, did not come into being unless the wells were physically capable of meeting the contractual requirements. In attempting to argue that a repudiation exists without reference to the condition, Appellants have run headlong against the prior opinion of this Court and the established law of the case.

In the first appeal this Court held, despite Appellants' argument that there had been a repudiation (Former Opening Brief for Appellants, pp. 64-71), that Appellees' duty to build or install the reservoir and pipelines was conditional, not absolute, and whether or not the condition existed was a circumstance to be established before the issue of total breach could be considered. Thus, the conclusion is inescapable that the law of the case is that until the sufficiency of water is determined, by arbitration if it has not been waived, Appellants have no standing to assert a repudiation by Appellees of the obligation to construct reservoirs and pipelines, since absent such sufficiency no such obligation existed.

At this point, Appellants would undoubtedly answer that only the duty to construct the reservoirs and pipelines was conditional not the obligation to develop the land and produce and sell water. And thus, these latter duties could be repudiated without reference to the sufficiency of water. The answer is obvious. No such duties appear in the contract and it is Appellees' position

that they do not exist. See Point IV, *infra.* If such duties could be implied, the sufficiency of water to meet the contractual criteria would necessarily be an implied condition precedent to such implied duties. After all, since Appellees acquired the property for the purpose of supplying water to the Montgomery lands, it is reasonable to assume that if the water supply was inadequate for their needs, Appellees would have neither the obligation to construct a reservoir or pipelines nor the obligation to go forward and develop the property by drilling new wells or improving old wells to produce insufficient quantities of water.

In view of the foregoing, it is respectfully submitted that Appellees cannot have forfeited their right to arbitration by repudiation or abandonment of their duties as argued, since the condition precedent to such duties, if they can be implied, cannot be said to have come into being until the issue of sufficiency has been resolved in the manner in which the parties agreed it should be resolved, *i.e.* by arbitration.

III.

Appellees as a Matter of Law Did Not Repudiate or Abandon Their Obligations Under the Contract.

While we feel that the question of repudiation must of necessity depend on the outcome of arbitration and the determination therein that a duty which could have been repudiated came into being because of the existence of an adequate water supply, see Point II, *supra,* and that only a repudiation of the arbitration clause itself could cause a loss of the contractual right to arbitrate, see Point V, *infra,* we also respectfully submit *arguendo* that sufficient evidence of repudiation and abandonment was not presented to the trial court.

It would be well at this time to review briefly the extent of Appellees' performance under the contract:

1. Appellees were to deliver one-sixth of the common stock of the Simi Valley Development Company to Appellants on the consummation date of the contract. Appellees fully performed this duty.

2. Appellees were obligated to pay $50,000.00 on the consummation date of the contract. This duty was performed.

3. Appellees were to pay at least $48,000.00 in monthly installments of $2,000.00 each for the two-year period following the consummation date. Of this amount Appellees paid $30,000.00, contending that the balance had been satisfied by payments totaling $28,000.00 made to Appellants, before the contract was consummated, without obligation on the part of Appellees. These earlier payments, it was provided, were to be a "credit on the purchase price" of the contract. Under these circumstances, it manifestly appears that Appellee's refusal to make further payments was based on a bona fide dispute and the lower court so found:

> "In this connection, the Court finds that there was a dispute in good faith as to the liability of defendants to pay said last nine monthly installments, the plaintiffs contending that the same were due and unpaid, and defendants contending that they had been paid. The remaining $28,000.00, paid prior to June 20, 1956, were voluntary payments, but, in accordance with said agreement, were to be a credit against the purchase price." [Former C. T. 354].

In the recent hearing below, the court stated:

> ". . . under the present posture of the case I certainly wouldn't feel inclined to hold that the failure to build the reservoir and pipelines was a total repudiation of the contract, and I wouldn't feel inclined to believe that the failure to make the payments of money due was a repudiation of the contract." [R. T. 409].

4. Appellees were to pay the balance of the purchase price at the rate of $.10 per 1,000 gallons of water produced, saved and sold from the Water Lands. According to the record below, no water was produced, saved or sold prior to February 1, 1960 [Affidavit of Glen Costin, Former C. T. 254], and thus it is respectfully submitted that the breach or compliance with this duty should not bear upon Appellees' request for arbitration which preceded that date.

5. Appellees were obligated to construct a reservoir and pipelines, subject to the conditions of adequate water. Appellees did not construct the facilities when required because, as they have consistently asserted, the Water Lands did not contain an adequate water supply. That Appellees' position in this respect has always been taken in good faith is borne out by not only Appellants' own evidence, as noted in our statement of the case, but also by the affidavits on file from Appellees: In Costin's affidavit of November 5, 1959, he sets out many of the tests performed and thereafter states:

> "It is untrue that no bona fide dispute exists as to the available water; that the controversy existing with the plaintiff is a failure to erect pipelines which the defendant claims they are not obligated under the agreement to do by reason of

lack of water to service the entire 1,600 acres, that the available water is only sufficient to serve approximately 200 acres under the Ventura County requirement; that the agreement between plaintiff and defendant, Murchison, does not require partial performance and since there is insufficient water to serve the 1,600 acres, there is no obligation on behalf of defendant to erect pipelines to service said acreage." [C. T. 83-84].

Please see also the affidavit dated October 18, 1961 [Former C. T. 252-257]. It may further be noted that the fact that the reservoir and pipelines were constructed, although at a time after this suit was commenced, would indicate an overall intention of the part of Appellees to perform the contract rather than to disavow it.

6. Appellees were also obligated to deliver certain quantities of water to Appellants, upon thirty days' written demand, if the amount paid in any one year was less than $24,000.00. No such demand in writing was ever made and Appellees are not in default of this obligation.

The above represents the sum total of Appellees' express obligations under the contract and the extent of their performance. In addition, the evidence on both sides indicates that Appellees did commence drilling operations, expended substantial sums in this connection, and performed numerous tests on the wells—although the amount of Appellees' efforts is in dispute.

It should also be noted that under the contract Appellees had the right to reconvey the Water Lands to Appellants and terminate the contract if in Appellees'

opinion the water on the water lands should no longer be capable of producing water in quantities sufficient to be commercially profitable to them. Appellees never exercised this right to terminate the contract.

In view of the substantial amount of performance under the contract and Appellees' belief that the condition precedent to their duty did not exist, it is clear that the statements made to Mr. Riess, if true, constituted not a repudiation but rather a proposal to enter into another contract. And the lower court was justified in finding at the first trial that Appellees had not repudiated the contract.

While the finding in the former trial of no repudiation might have been "gratuitous" since the issue was properly one for the jury, as the Appellate Court declared in the first appeal, that finding does have application to the instant appeal. Here, the question of repudiation was raised on a motion for arbitration and stay and was for the court, not the jury, to decide.

Furthermore, whether there was repudiation depends entirely on Mr. Riess' credibility, and this is a matter that must lie within the realm of the trial court since it observed the demeanor of the witness on both occasions when he testified and the effect of cross-examination at the first trial.

Based on the foregoing it is respectfully submitted that a holding on the present record that as a matter of law Appellees by their alleged statements to Mr. Riess or their failure to develop the land and sell water repudiated or abandoned the express requirements of the contract would be inappropriate.

IV.

There Is No Implied Duty to Develop the Water Lands and to Produce, Save and Sell Water.

In Point IIB of their brief, Appellants state that the contract in question contemplated the development of the Montgomery lands and that these lands would be supplied with water from the Water Lands. By this statement Appellants apparently mean that Appellees had an implied obligation to develop the water resources, and in failing to do so, they abandoned and breached the contract, thereby losing the right to refer to arbitration the matter of the sufficiency of the water.

Appellants cannot be relying on the doctrine of "frustration of purpose," despite the similar terminology in the point heading. That doctrine furnishes an excuse for non-performance whenever a fortuitous event supervenes to cause a failure of the consideration or a practically total destruction of the expected value of the performance. *Autry v. Republic Productions, Inc.,* 30 Cal. 2d 144, 180 P. 2d 888 (1947).

In support of their position, Appellants cite the case of *Acme Oil & Mining Co. v. Williams,* 140 Cal. 681, 74 Pac. 296 (1903). There the defendant leased certain oil lands to the plaintiff in exchange for the right to royalties. The lease provided that in case of the lessee's default, plaintiff had the right to re-enter the premises and terminate the lease. Because of the failure of the lessee to work the oil wells with reasonable diligence, the lessor thereafter declared a forfeiture and took possession of the premises. In upholding his right, the California Supreme Court found an implied covenant in the contract that if oil were present in paying quantities the oil wells would be diligently operated for

the best advantage and benefit of the lessee and lessor. The court based its reasoning on the following:

"The *sole consideration* usually moving the lessor in extending oil leases is, and the only consideration for the particular lease involved here was, the royalties the lessor would receive from proper and continuous pumping of oil, after it had been developed in paying quantities. These leases are only valuable on development, and are then only valuable to both parties, to the extent that the product may be secured and disputed of, and *when the only consideration for the lease is the share which the lessor will obtain of what is produced, there is always an implied covenant that diligence will be used toward such production.*

There are few other mining enterprises where delay is so dangerous, and where diligence in securing immediate possession of the mineral is so necessary as in mining for oil. As to the precious metals, fixed in the veins which hold them, they remain intact until extracted.

Oil, on the contrary, is of a fluctuating, uncertain, fugitive nature, lies at unknown depths, and the quantity, extent, and trend of its flow are uncertain. It requires but a small surface area, in what is known as an oil district, upon which to commence operations for its discovery. But when a well is developed the oil may be tributary to it for a long distance through the strata which holds it This flow is not inexhaustible, no certain control over it can be exercised, and its actual possession can only be obtained, as against others in the same field, engaged in the same enterprise, by dili-

gent and continuous pumping. It is the property of anybody who can acquire the surface right to bore for it, and when the flow is penetrated, he who operates his well most diligently obtains the greatest benefit, and this advantage is increase in proportion as his neighbor similarly situated neglects his opportunity. Hence it is, that ever since the discovery of petroleum in this country, leases of oil lands, with royalty to the lessor on the product, have contained provisions, not only for the immediate sinking of wells and their number, but for diligent operation after oil has been struck, and where such leases do not contain express provisions to this effect, and the *only consideration* for their execution is the share in the product which the lessor, either in kind, or as a royalty, is to receive, it is necessarily implied, as of the essence of the contract, that the lessee shall work the wells with reasonable dispatch for their mutual advantage." *Id.* at 684-85. (Emphasis added).

It is evident from the foregoing that the *Acme Oil* case is inapplicable to the case at hand. Under the instant contract, Appellants were to receive one-sixth interest in Simi Valley plus $50,000.00 on the consummation date and $24,000.00 in each of the following two years. The balance of the $1,000,000.00 was to be paid at the rate of $.10 per thousand gallons of water produced, saved and sold from the water lands, provided, however, *that if during any year the amount payable at this rate should be less than $24,000.00, the plaintiffs were to be entitled to take the difference in water at the rate of $.20 per one thousand gallons of water.* It is apparent, then, that the *sole* consideration

was not based on the water produced. Appellants were not only guaranteed the stock plus $98,000.00 in cash (which they received plus another $10,000.00), but were entitled to take up to $24,000.00 worth of water each year thereafter during the span of the contract, which they might dispose of as they pleased. It is also apparent that the *Acme* court arrived at its holding because of the abundant evidence of industry custom and usage and the particular quality of oil. There is no comparable evidence in the case at hand.

In addition, there can be no implied covenants in a contract, such as that involved in the present case, which contains express covenants inconsistent with those sought to be implied. Thus, while *Hartman Ranch Co. v. Associated Oil Co.,* 10 Cal. 2d 232, 73 P. 2d 1163 (1937), cited at page 43 of Appellants' brief, also involved an oil lease where the sole consideration was royalties and consequently is inapposite to the facts at hand, at page 239, immediately after the section quoted by Appellants, the court states, "It is agreed, of course, that implied covenants will not be raised which are in conflict with express covenants." In the instant case, the parties expressly decided what remedy would be available to Appellants should Appellees fail to save, produce and sell water. In such event Appellants had the right to take up to $24,000.00 worth of water a year. Consequently, a covenant cannot be implied requiring Appellees to produce, save and sell water, the parties having spelled out Appellants' rights by an ex-

press covenant inconsistent with that sought to be implied.

The cases of *Sauder v. Mid-Continent Petroleum Corp.*, 292 U.S. 272, 54 S. Ct. 671 (1934); and *Rehart v. Klossner,* 48 Cal. App. 2d 40 (1941), cited at page 43 of Appellants' Brief, are also oil lease cases with the sole consideration depending upon oil production, and are likewise inapplicable to the case at hand.

The case of *Lippman v. Sears Roebuck & Co.,* 44 Cal. 2d 136, 280 P. 2d 775 (1955), also relied upon by Appellants at pages 43-44 of their brief is clearly distinguishable. There, the trial court found that the lease provision calling for a minimum monthly rental of $285.00 was intended to be and was, in fact, *a nominal rental and was not a substantial or adequate minimum rental.* By contrast, the present case, because of the substantial size of the guaranteed payments, would be governed by the decisions in *Cousins Inv. Co. v. Hastings Closing Co.,* 45 Cal. App. 2d 141, 113 P. 2d 878 (1941), and *Masciotra v. Harlow,* 105 Cal. App. 2d 376, 233 P. 2d 586 (1951), distinguished in the *Lippman* case. The court in *Lippman* stated as follows, at 142 and 144:

> "The rules which govern implied covenants have been summarized as follows: '(1) the implication must arise from the language used or it must be indispensable to effectuate the intention of the parties; (2) it must appear from the language used that it was so clearly within the contemplation of the parties that they deemed it unnecessary to

express it; (3) implied covenants can only be justified on the grounds of legal necessity; (4) a promise can be implied only where it can be rightfully assumed that it would have been made if attention had been called to it; (5) *there can be no implied covenant where the subject is completely covered by the contract.*'

* * *

In *Cousins Inv. Co. v. Hastings Clothing Co.* . . . the lessee had occupied the premises for several years under a written lease calling for the payment of a monthly rental of $2,750. The lease was renewed but with the rental increased to $5,500 per month plus taxes. After the lessee had found it difficult to pay that amount of rent, the parties agreed to a revision of the lease to provide for a 'reserved rental' of $4,000 per month plus 5½ per cent of the gross income to be paid in such a manner as to limit the total rent during a six-month period to an average of $5,500 per month. With a little more than a month remaining under the revised lease, the lessee removed to a different location and, for the final month, paid only the minimum rental. The lessor sued for rent upon the theory that after the lessee had impliedly covenanted to remain in business at that location for the full term of the lease, he breached that covenant. The court held there was no such covenant. There was nothing in the nature of the transaction, it concluded, 'to justify a finding that the implied covenant was indispensable to effectuate the intention of the parties, nor can it be supported on the grounds of legal necessity. On the contrary, as defendant argues, it would seem

that the covenant to pay the minimum rental was inserted in the lease as a substitute for an express covenant requiring the continuous operation of the demised premises: that when the rental reserved in a lease is based upon a percentage of the gross receipts of the business, with a substantial, adequate minimum, there is no implied covenant that the lessee will operate its business in the demised premises throughout the term of the lease." (P. 149.)

This conclusion was followed in *Masciotra v. Harlow,* 105 Cal.App.2d 376, 381 [233 P.2d 586]. In that case the defendant leased property for the purpose of operating a restaurant, promising to pay a monthly rental of 7 percent of the gross receipts with a minimum of $250. After several years of successful operation under the name 'Pump Room,' the defendant opened a new restaurant at a different location, transferring the name 'Pump Room' and two-thirds of the personnel to the new location. Defendant continued to operate a restaurant on the old premises, but business fell off and the rentals remained at the minimum. The lessor sued contending that 'there is an implied covenant that lessee would, during the term of the lease, so conduct his business on plaintiff's premises as to make it mutually profitable to both parties.' (P. 379.) The court refused to imply a covenant, concluding that 'the parties considered the stipulated minimum rent to be in itself fair and adequate and any additional sum was in the nature of a bonus which the lessee was willing to pay if his business exceeded his expectations.' (P. 380.)" (Emphasis added).

Finally, in *Kasey v. Molybdenum Corp. of America,* 336 F. 2d 560, 572 (9th Cir. 1964) (dictum), this Court observed, in response to the argument that the purchaser of certain mining property had abandoned and repudiated his agreement by breaching his alleged duty to work the properties from which the sellers were entitled to royalties, as follows:

> "It is far from clear whether there is such a duty on Appellee. Such a duty is often implied, but ordinarily only where the royalty agreement is the sole consideration for the conveyance or lease."
>
> See generally Annot., "Implied Obligation of Purchaser or Lessee to Conduct Search for, or to Develop or Work Premises for, Minerals other than Oil and Gas," 76 A.L.R. 2d 721 (1961).

The above authorities compel the conclusion in this case that a covenant requiring the Appellees to produce, save and sell water should not be implied into the express contract involved herein. Unlike the cases cited by Appellants, Appellants in this case have received a substantial amount of consideration. Furthermore, the parties expressly provided for a minimum yearly payment and gave Appellants the right to take water at the well-head if production did not yield payments in the specified annual amount, thus anticipating the possibility that water would not be produced. Thus there is neither legal necessity to imply a covenant, nor room for its implication.

V.

Since Appellees Did Not Repudiate or Abandon the Agreement to Arbitrate Itself They Are Entitled to Arbitration.

Under the general rule in California and elsewhere a repudiating party forfeits his right to arbitration *only* when the repudiation includes the arbitration clause as well. Otherwise, the agreement to arbitrate stands and must be enforced.

Local 659, I.A.T.S.E. v. Color Corp. of America, 47 Cal. 2d 189, 302 P. 2d 294 (1956) (In bank);

Bertero v. Superior Court, 216 Cal. App. 2d 213, 30 Cal. Rptr. 719 (1963);

Tas-T-Nut Co. v. Continental Nut Co., 125 Cal. App. 2d 351, 270 P. 2d 43 (1954);

Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers Int'l., AFL-CIO, 370 U.S. 254 (1962);

Heyman v. Darwins, Ltd. [1942], A.C. 356 (H.L.);

Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F. 2d 978 (2d Cir. 1942);

In re Pahberg Petition, 131 F. 2d 968 (2d Cir. 1942);

The Batter Building Materials Co. v. Kirschner, 142 Conn. 1, 110 A. 2d 464 (1954);

6A Corbin, *Contracts,* §1443, pp. 434-43 (1962);

17A C.J.S., *Contracts,* §515(5);

Annot., "Violation or Repudiation of Contract as Affecting Right to Enforce Arbitration Clause Therein," 3 A.L.R. 2d 383 (1949).

The decision of the California Supreme Court in the *I.A.T.S.E.* case, *supra*, bears heavily on this point. There, a dispute arose under a collective bargaining agreement between the defendant corporation and several unions over the rights of various employees to dismissal pay. In accordance with the contract, grievance and arbitration proceedings were commenced between the corporation and all of the unions, except Local 659. That local instead brought an action before the State Labor Commission to recover the alleged dismissal pay. When the defendant asked the union to dismiss the action and arbitrate pursuant to the contract the union repeatedly refused. Finally, defendant informed the union that it would no longer consent to arbitration because of the union's repudiation.

Subsequently, when the arbitration proceedings proved fruitful to the other unions, Local 659 brought an action in the state court asking that the defendant be required to arbitrate the dispute. The trial court dismissed the suit finding that the union was in "default" in proceeding with arbitration because of its unreasonable delay, and because of its repudiation of the arbitration clause and election to proceed before the State Labor Commission. The Supreme Court affirmed.

We take the liberty of quoting the opinion because of its relevancy to the case at hand:

> "The question thus presented is whether or not there has been a waiver, mutual rescission, repudiation, laches, or estoppel by or on behalf of petitioner in the enforcement of the arbitration clause. We are not concerned here with any question involving the repudiation or violation of the terms of the bargaining agreement other than the arbitra-

tion provision. (See conflict of authorities on that subject: 3 A.L.R. 2d 383.) . . .

* * *

Although one party can not by himself 'rescind' a contract, he can wrongfully 'repudiate' it. What is the effect of his repudiation? To answer this, we must first interpret his expressions and determine the coverage of the repudiation. Suppose first that he repudiates the agreement to arbitrate itself. By such a repudiation he does not deprive the other party of his right to arbitration; and if the repudiator brings an action in breach of his valid arbitration agreement the defendant can defend on the ground that arbitration is a condition precedent, or under a statute can obtain a stay or an order to arbitrate, or can counterclaim for damages. But such a repudiator has himself no right to arbitration. The other party can now bring his action in reliance on the repudiation, or otherwise change his position in reliance. Thereafter, the repudiator has no power of retraction and can not insist on the remedy by arbitration. . . .

'In determining whether a repudiation or other vital breach of a contract should deprive a party of his right to an arbitration of the existing dispute, the court should consider the form and extent of the repudiation or breach and the reasons for which it occurred. *A repudiation that clearly includes the arbitration provision itself should prevent the repudiator from using it in defense when sued in the courts. If the provision is not itself repudiated and the issue that is raised by the alleged breach is one that is within the coverage of the provision, the de-*

fendant should be supported in insisting on arbitration of the issue unless his bad faith and wilful misconduct are sufficiently obvious to justify a discretionary refusal of such support.' (Corbin on Contracts, § 1443.) . . ." *Id.* at 194-196 (Emphasis added).

Bertero v. Superior Court, supra, cited by this Court in the previous appeal, also merits close attention. In this case, the plaintiff had been employed by the defendant under a five-year contract which contained an arbitration clause covering all disputes under the contract. After three years of service, defendant's president sent plaintiff a letter stating that the contract was "invalid and unenforceable," and that "in any event the company hereby terminates and cancels such agreement." Thereafter, plaintiff filed suit in the Superior Court for accrued salary and declaratory relief. Defendant moved for an order compelling arbitration. The motion was granted and the proceedings were stayed. The District Court of Appeal reversed, taking the view that defendant *had repudiated the arbitration clause itself.* After quoting substantially the same language from the Corbin treatise as was used in the *I.A.T.S.E.* case, *supra,* the court goes on to state at 221-222:

> "National makes the argument in this court that the March 29 letter meant that Bertero's asserted right to benefits under the contract was invalid but National's right to arbitration was not invalid. National points out that the arbitration clause may be valid and enforceable even though National has a good defense against enforcement of any of the other terms of the agreement. It is a sufficient answer to point out that there is nothing in the let-

ter to qualify it in this manner. When National said 'the agreement' was not enforceable, it was saying that the portion relating to arbitration was not enforceable. When National concluded that it would no longer pay Bertero his salary, National was free to demand arbitration if it then believed that the written agreement to arbitrate had any force or effect. Instead, it wrote the letter of repudiation. Bertero was entitled to consider it a true statement of National's position, and to rely upon it in commencing his own action to enforce the contract. . . .

We are not here concerned with any question involving the repudiation or violation of any of the terms of the contract other than the arbitration clause. For the purpose of this decision it may be assumed (since we need not decide) that National might have, without waiving arbitration, repudiated or otherwise breached every other obligation contained in the agreement. The 1961 statute (Code Civ. Proc., § 1281.2) expressly provides that if an agreement to arbitrate exists, an order to arbitrate will not be refused on the ground that the petitioner's contentions lack substantive merit. The rationale of the rule, as it evolved through case law, is discussed in *Posner v. Grunwald-Marx, Inc.*, 56 Cal.2d 160 [14 Cal.Rptr. 297, 363 P.2d 313]. *Thus it is not because National has repudiated its promise to pay Bertero's salary, but because it has repudiated its promise to arbitrate, that Bertero was justified in resorting to the courts. . . .*

The record before the superior court established as a matter of law that National had waived the right to compel arbitration and that Bertero had

commenced his action in reliance upon that waiver. It was therefore an abuse of discretion for the superior court to stay the action and order the parties to arbitrate." (Emphasis added).

The *Tas-T-Nut* case, *supra,* relied upon by both the *I.A.T.S.E.* and *Bertero* courts, provides additional support for Appellees' position. There, defendant had breached a contract by failing to deliver at the time specified. Thereafter, the plaintiff buyer requested arbitration of the damages in accordance with a clause in the contract. Correspondence ensued, the plaintiff generally insisting on immediate arbitration, and the defendant expressing a reluctance to arbitrate, though not expressly refusing. Finally, plaintiff demanded a statement by defendant by a certain date whether defendant would arbitrate or not. Defendant replied, stating that it felt that arbitration was unwarranted. Later, however, despite this apparent repudiation of the arbitration clause, defendant agreed to arbitration and even insisted upon it before suit was brought by plaintiff.

Notwithstanding defendant's breach of contract and its implied repudiation of the arbitration clause at one point, the Court of Appeals reversed the lower court and held that defendant was entitled to arbitration since its repudiation of the clause had been withdrawn prior to the time that plaintiff elected to bring suit. The court explains at 358:

> "The record is clear, therefore, that, even if we assume appellant's somewhat dilatory tactics amounted to an implied repudiation of its obligation to arbitrate, yet there was no election on the part of respondent to accept such conduct as a re-

pudiation and, acceding thereto itself, to abandon its own right to arbitrate until long after appellant had indicated its desire to join in arbitration. . . .

* * *

Election not having been made before that time, the right to elect was gone and so long thereafter as appellant did nothing further justifying a holding that it had again repudiated its obligation to arbitrate the election was not revived.

Where parties have agreed to arbitrate their differences it is the clear intent of the California arbitration statute that courts should enforce the performance of that agreement and when, notwithstanding the agreement, suit has been filed, the statute specially enjoins the court, if the defendant seeks to claim the right to arbitrate, to stay the court action until arbitration has been accomplished, affording in the meantime ample remedies to either party to compel the performance of the mutual obligation of the parties. Says section 1284 of the Code of Civil Procedure:

'If any suit or proceeding be brought upon any issue arising out of an agreement providing for the arbitration thereof, the court in which such suit or proceeding is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration, shall stay the action until an arbitration has been had in accordance with the terms of the agreement: provided, that the applicant for the stay is not in default in proceeding with such arbitration.'

Whatever default in proceeding with arbitration the appellant may have been guilty of in the early

> stages of its controversy with respondent it is clear from the record that well before the action was begun the appellant was the party that was active in the implementation of the arbitration. When, therefore, it applied to the trial court for a stay it was not in default in proceeding with the arbitration and it was error on the part of the trial court to refuse to stay the court action. . . ."

Thus, it would appear that even where the arbitration clause is repudiated specifically, the repudiator does not lose his rights to arbitration if such repudiation is withdrawn before action is taken in reliance upon it.

Additional support for the proposition that only a repudiation of the arbitration clause itself, and not the contract generally, will preclude a party from requiring arbitration is evidenced by the wording of Section 1284 (now superseded) of the California Code of Civil Procedure cited above. That section required a stay of proceedings unless the applicant is "in default in proceeding with such arbitration." This limiting language makes it abundantly clear that it is not any default under the contract that results in a loss of arbitration rights, but rather only a default *in proceeding with arbitration.* The California courts have recognized this view in their interpretation of the related Section 1282 of the Code of Civil Procedure. In *Weiman v. Superior Court,* 51 Cal. 2d 710, 336 P. 2d 489 (1959) the Supreme Court stated at 712-713:

> "Thus the word 'default,' as used throughout the section, obviously refers only to the 'default' of a party in refusing to proceed to arbitration as agreed rather than to a default by a party under the main provisions of the parties' contract. As was said in

> *Pneucrete Corp. v. United States Fid. & Guar. Co.,* 7 Cal.App.2d 733, at page 740 [46 P.2d 1000]: "The Civil Procedure refers to 'the failure to comply with the agreement to arbitrate.'" We therefore conclude that where the parties have admittedly agreed in writing, as in the present case, that "Any disagreement arising out of this contract . . . shall be submitted to arbitration," then the only "default" which need be shown before an order for arbitration may be made under section 1282 is that a 'disagreement' has arisen and that a party has refused to submit such 'disagreement' to arbitration. Any other interpretation of the section would defeat the main purpose of arbitration proceedings, which is to obtain an expeditious hearing and determination by arbitrators of any 'disagreement' which may arise."

Section 1282 of the Code of Civil Procedure, which provides for an original action to compel arbitration as opposed to a stay of existing proceedings, contains language substantially identical to Section 1284. Please note the following:

> "If the finding be that no agreement in writing providing for arbitration was made, or that there is *no default in proceeding thereunder,* the proceeding shall be dismissed. If the finding be that a written provision for arbitration was made and there *is a default in proceeding thereunder,* an order shall be made summarily directing the parties to proceed with the arbitration in accordance with the terms thereof." (Emphasis added).

The Legislature enacted both of these measures together, and it is reasonable to believe that the word "default"

as used in 1282 means the same as it does in Section 1284.

Significantly, the identical language contained in Section 3 of the United States Arbitration Act, Title 9, United States Code, has been limited to defaults in proceeding with arbitration and not defaults under the contract generally.

See:

Kulukundis Shipping Co. v. Amtorg Trading Corp., supra at 989;

Wilson & Co. v. Freemont Cake & Meal Co., 77 F. Supp. 364, 380 (D. Neb. 1948).

The above sections of the California Code of Civil Procedure of course govern the rights of the parties at the time this suit was commenced and the defendants applied for arbitration. Subsequently in 1961, these statutes were re-written. See California Civil Code sections 1281.2-1281.4. The new statute is now framed in terms of "waiver" rather than "default." However, this amendment does not appear to change the recognized principle that the repudiation, default, or waiver must go to the arbitration clause particularly in order for the benefits thereof to be lost.

Lending further support to Appellees' contention herein is the *Drake Bakeries* case *supra,* at 262-63: An employer brought an action for damages due to the alleged violation by the union of a no-strike clause in the contract between the parties. Pursuant to the union's motion, the action was stayed and arbitration ordered. The United States Supreme Court affirmed, despite the

employer's argument that the union must be deemed to have waived or to be estopped from asserting its right to arbitrate. The Court stated:

> "Arbitration provisions, which themselves have not been repudiated, are meant to survive breaches of contract, in many contexts, *even total breach;* and in determining whether one party has so repudiated his promise to arbitrate that the other party is excused the circumstances of the claimed repudiation are critically important." (Citing 6 Corbin, Contracts §1443, pp. 192-193 (1961 Supp.)) (Emphasis added).

Perhaps the leading case on point is the House of Lords decision in *Heyman v. Darwins, Ltd.* [1942] A.C. 356. In holding that an arbitration clause survives the repudiation of a contract and overruling Lord Haldane's decision in *Jureidini v. National British & Irish Miller's Ins. Co.* [1915] A.C. 499, Lord McMillan stated at 373-375:

> "Repudiation, then, in the sense of a refusal by one of the parties to a contract to perform his obligations thereunder, does not of itself abrogate the contract. The contract is not rescinded. It obviously cannot be rescinded by the action of one of the parties alone. But, even if the so-called repudiation is acquiesced in or accepted by the other party, that does not end the contract. The wronged party has still his right of action for damages under the contract which has been broken, and the contract provides the measure of those damages. It is inaccurate to speak in such cases of repudiation of the contract. The contract stands, but one of the parties has declined to fulfill his part of it.

There has been what is called a total breach or a breach going to the root of the contract and this relieves the other party of any further obligation to perform what he for his part has undertaken. Now, in this state of matters, why should it be said that the arbitration clause, if the contract contains one, is no longer operative or effective? A partial breach leaves the arbitration clause effective. Why should a total breach abrogate it? The repudiation being not of the contract but of obligations undertaken by one of the parties, why should it imply a repudiation of the arbitration clause so that it can no longer be invoked for the settlement of disputes arising in consequence of the repudiation? . . .

I am, accordingly, of opinion that what is commonly called repudiation or total breach of a contract, whether acquiesced in by the other party or not, does not abrogate the contract, thought it may relieve the injured party of the duty of further fulfilling the obligations which he has by the contract undertaken to the repudiating party. The contract is not put out of existence, though all further performance of the obligations undertaken by each party in favour of the other may cease. It survives for the purpose of measuring the claims arising out of the breach, and the arbitration clause survives for determining the mode of their settlement. The purposes of the contract have failed, but the arbitration clause is not one of the purposes of the contract.

There still remains the difficulty raised by the dicta of Lord Shaw and Lord Haldane which I

have quoted. It is said to be wrong to allow a party to a contract who has refused to perform his obligations under it at the same time to insist on the observance of a clause or arbitration embodied in the contract. The doctrine of approbate and reprobate is said to forbid this. I appreciate the apparent dilemma, but with the greatest respect I venture to think it is based on a misapprehension. The key is to be found in the distinction which I have endeavoured to draw between the arbitration clause in a contract and the executive obligations undertaken by each party to the other. I can see nothing shocking or repugnant to law in one business man saying to another that he regrets he finds himself unable to go on with his deliveries under a contract between them and at the same time asking the other to join with him in a reference under an arbitration clause in their contract to ascertain what compensation is to be paid for his default."

Accord:

Woolf v. Collis Removal Service [1948] 1 K.B. 11, 3 A.L.R. 2d 378.

Additional federal authority on point is represented by the opinion of the Court of Appeals for the Second Circuit in the *Pahlberg* case, *supra*. Relying on the House of Lords decision in *Heyman v. Darwins, supra,* and the previous Circuit opinion in *Kulukundis Shipping Co., supra,* the Court upheld the granting of a petition for arbitration pursuant to the terms of a charter party even though the petitioner had repudiated the contract by failing to deliver the steamship within the time permitted.

See also:

Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F. 2d 402, 410 (2d Cir. 1959).

In the *Kirschner* case, *supra,* 110 A. 2d at 469-470, the Court of Errors and Appeals of Connecticut stated:

> "The modern British view seems to us to be sound. It rests on the proposition that what is commonly called repudiation or total breach of contract, whether acquiesced in by the other party or not, does not abrogate the contract, though it may relieve the injured party from further fulfillment of his contractual obligations. . . . Heyman v. Darwins, Ltd., supra, 374. The tendency of late federal decisions appears to foreshadow or to accept the modern British view. In re Pahlberg Petition, 2 Cir., 131 F.2d 968, 970; Kulukundis Shipping Co. v. Amtorg Trading Corporation, 2 Cir., 126 F. 2d 978, 989. . . .
>
> A similar trend is indicated in New York. Matter of Lipman (Haeuser Shellac Co.), 289 N.Y. 76, 79, 43 N.E.2d 817, 142 A.L.R. 1088; see note, 3 A.L.R.2d 383, 424 et seq. We add our approval to the British doctrine so far as it pertains to contracts providing for arbitration of disputes which involve something more than the determination of an appraisal or the setting of a value. 6 Corbin, Contracts, p. 758;"

In light of the above authorities, it is apparent that Appellants are quite wrong when they say, "The law is clear that a party to a contract who repudiates it, cannot claim the benefit of a provision of the contract allowing arbitration." (Brief for Appellants, p. 30). In

fact, their own authorities do not support them. The *I.A.T.S.E.* and *Bertero* cases, cited on page 34 of Appellants' Brief, are described above and clearly stand for the proposition that the repudiation must equate to the arbitration clause itself in order for those benefits to be lost. Similarly, the case of *Grunwald-Marx, Inc. v. Los Angeles Joint Board,* 192 Cal. App. 2d 268, 13 Cal. Rptr. 446 (1961), fails to support Appellants' proposition. In this case, a union was held to have waived its right to arbitration not because of a repudiation of the contract, but rather because the union unequivocally repudiated the arbitration clause by refusing to arbitrate upon the employer's request.

The two quotations from Professor Corbin's 1951 treatise, cited on pages 30 and 31 of Appellants' Brief, and the quote from *Corpus Juris Secundum* on page 32, do not pertain to the right of a party to arbitration who has repudiated the contract. Indeed, when dealing with this particular issue Professor Corbin clearly indicates that arbitration is lost only when the arbitration clause itself is repudiated. See 6A Corbin, *Contracts* §1443, pp. 434-443 (1962), and also 17A C.J.S., *Contracts,* §515(5).

Similarly, the cases of *Caughlin v. Blair,* 41 Cal. 2d 587, 262 P. 2d 305 (1953); *Gold Mining & Water Co. v. Swinerton,* 23 Cal. 2d 19, 142 P. 2d 22 (1943); *American Type Founders' Co. v. Packer,* 130 Cal. 459, 62 Pac. 744 (1900); *Clarke Contracting Co. v. City of New York,* 229 N.Y. 413, 128 N.E. 241; and *Helger Corp. v. Warner's Features,* 222 N.Y. 449, 119 N.E. 113, cited at pages 32 and 34 of Appellants' Brief, while involving questions of repudiation and breach, do not discuss the effect of such actions upon an arbitra-

tion clause, and thus are inapplicable to the question at hand.

In the case at hand, Appellees have never at any time expressly or impliedly refused to proceed with arbitration. Quite to the contrary, since this action was instituted, Appellees have requested arbitration at every step of the proceeding, and the record below is replete with such motions. Furthermore, before the filing of this suit and at the time when the dispute between the parties regarding adequacy of the water first arose, Appellees requested arbitration. These requests were not at any time retracted. In this respect, Appellees are in much the same position as the defendant in *Squire's Department Store, Inc. v. Dudum,* 115 Cal. App. 2d 320, 327-328, 252 P. 2d 418 (1953):

> "He made timely application for arbitration when he filed the second action. He made timely application for a stay in the first action. He never disavowed his insistence upon arbitration or relinquished his right thereto. Whenever pleading to the complaint in the first action, he included a plea of the arbitration agreement in bar or as a stay of the court action. He was, therefore, *not in default in proceeding with such arbitration.*"

Manifestly then, Appellants have neither repudiated nor abandoned the arbitration clause. Nor have they like the defendant in the *Bertero* case, *supra,* denied the validity or enforceability of the contract and thereby implicitly repudiated the arbitration clause.

The general rule allowing arbitration to a party who has allegedly breached or repudiated the contract but not the arbitration clause is a sound one. By reason of this rule, the trial court need only determine, on a motion

for stay, whether the moving party has been in default in proceeding with arbitration by refusal to arbitrate, or by unreasonable delay in asserting arbitration, or by failing to plead the provision as a defense, etc. If there has been no such default or waiver the court's inquiry is over and the dispute must be resolved by arbitration. By contrast, a rule conditioning one party's right to arbitration on his lack of breach or repudiation of his contractual duties would be totally unworkable. Under such a rule, whenever one party to a contract sought arbitration of a dispute, the other could oppose on the grounds that the former had breached, repudiated, or abandoned the contract. The court would then have to try the very issue left for arbitration in order to determine first whether arbitration was permitted or not. If the court found no breach, the issue would then go to arbitration and have to be determined all over again. Mr. Pickwick to the contrary notwithstanding, the law is not an ass.

It should also be noted that California state policy favors arbitration. In *Grunwald-Marx, Inc. v. Los Angeles Joint Board, supra,* at 276-277, the court stated:

> "It has long been the policy in California to recognize and give the utmost effect to arbitration agreements. As stated in *Utah Construction Co. v. Western Pacific Ry. Co.,* 174 Cal. 156, 159 [162 P. 631]: 'The policy of the law in recognizing arbitration agreements and in providing by statute for their enforcement is to encourage persons who wish to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing . . . Therefore every reasonable intendment will be indulged to give effect to such proceedings.' "

We would further respectfully submit that arbitration is especially appropriate to the case at hand where the issue in dispute calls for technical analysis and expert opinion and can more knowledgeably and efficiently be handled by arbitrators who are experienced in the field. That the parties recognized this circumstance at the time they contracted is, doubtless, the genesis of the arbitration provision.

We finally noe that the cases of *Banks v. Calstar Petroleum Co.,* 82 Cal. App. 2d 789, 187 P. 2d 127 (1947), and *Hanes v. Coffee,* 212 Cal. 777, 300 Pac. 963 (1931), cited on pages 55 and 56 of Appellants' Brief, fail to support Appellants' position. In the *Banks* case, the lessee of an oil and gas lease argued that it was error not to refer the issues of abandonment and damages to arbitration in accordance with an arbitration clause in the lease. Holding contrary to the lessee, the court noted that during the four years prior to suit, the lessee had not produced any oil from the property, had in fact capped the well, and had given notice of intention to abandon the lease to the Division of Oil and Gas of the State of California. *These actions constituted a complete abandonment as a matter of law and thus there was no issue for arbitration.* The court further stated at 793:

> "Moreover, at the trial of the action appellant relinquished any claim that it might have had to arbitration of the question of damages alleged to have been suffered by respondents by reason of appellant's occupancy of the property, and practically gave its consent to a judgment of abandonment and for damages."

In the case at bar, Appellees have not as a matter of law abandoned the contract. Furthermore, the question

for arbitration is not abandonment but rather sufficiency of the water supply, and Appellees have never conceded this issue.

In *Hanes v. Coffee, supra,* the issue in controversy was whether the lease ever became operative and this was held not to be a proper subject for arbitration. By contrast, the dispute in the instant case centers around the very issue agreed to be arbitrated, namely, the adequacy of water on the Water Lands.

In view of the foregoing, we respectfully submit that since Appellees neither refused to arbitrate nor abandoned the arbitration clause, nor are otherwise in default in proceeding with arbitration, they are entitled to it, and the decision of the lower court must be affirmed.

VI.

The Order Is Not Defective for Failure to Set Forth Findings of Fact.

In response to Appellants' argument in Point III of their Opening Brief, we respectfully submit that the form of the order in question is proper for the following reasons:

First, the trial judge was under no obligation, we believe, to make findings of fact. Rule 52(a) of the Federal Rules of Civil Procedure specifically limits that obligation as follows:

> "In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall sim-

> ilarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. . . . Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 *or any other motion* except as provided in Rule 41(b) [Motion for Involuntary Dismissal]." (Emphasis added).

The instant order is based on a *motion* to compel arbitration and stay of proceedings, and it would seem quite clear under the language of the Rule that no findings are required.

Despite the express mandate of Rule 52(a), however, the case of *Carey v. Carter,* 344 F. 2d 567 (D.C. Cir. 1965), cited by Appellants, reaches a contrary result. This case to our knowledge represents the only decision on the issue at hand and we believe it is wrong.

The *Carey* case cites as authority the Supreme Court's opinion in *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.,* 293 U.S. 449 (1935). There, in a breach of contract action, the trial court had denied a motion by the defendant to require arbitration and stay all further proceedings. The defendant's right to appeal the interlocutory order was sustained by the Supreme Court which treated the denial of the stay as the denial of an injunction.

Subsequent cases, however, have refused to expand the reasoning of the *Shankeroke* case beyond its facts and have instead limited the decision severely. For example, it is now held that where the original action sought to be stayed is equitable rather than legal, the *Shanferoke* rule does not apply. *Baltimore Contractors v. Bodinger,* 348 U.S. 176 (1955); *Alexander v. Pa-*

cific Maritime Assoc., 332 F. 2d 266 (9th Cir. 1964). In the *Baltimore* case, the Court observed:

> " 'Many interlocutory orders are equally important, and may determine the outcome of the litigation, but they are not for that reason converted into injunctions.' "

Similarly, a year after *Shanferoke*, the Supreme Court refused to apply the doctrine in cases involving admiralty. *Schoenamsgruber v. Hamburg American Line,* 294 U.S. 454 (1935). The court distinguished *Shanferoke* as follows:

> "That decision was based on the Enelow Case. Each of these was an action at law in which the defendant by answer sought equitable relief. In each the order held appealable stayed proceedings on the law side and operated as an injunction, within the meaning of that section, against proceedings in another court. The cases now before us are in admiralty. The orders appealed from merely stay action in the court pending arbitration and filing of the award. As shown by the Enelow Case, they are not interlocutory injunctions within the meaning of section 129. And plainly, so far as concerns appealability, they are not to be distinguished from an order postponing trial of an action at law to await the report of an auditor." *Id.* at 456-457.
>
> Accord: *Moran Towing and Transportation Co. v. U. S.,* 290 F. 2d 660 (2d Cir. 1961).

In *American Airlines, Inc. v. Forman,* 204 F. 2d 230 (3rd Cir. 1953), the court refused to treat the denial of a motion to dismiss the complaint as the de-

nial of an injunction under the *Shanferoke* theory. The court stated at 231:

> "Moreover, the vitality of the Enelow and Ettelson doctrine is now at least gravely impaired by City of Morgantown, W. Va. v. Royal Insurance Co. . . . Whether the impairment is fatal the majority of the Supreme Court did not decide, and we shall not anticipate that decision. But we do think the manifest attitude of the Supreme Court in Morgantown is such that Enelow and Ettelson should be restricted to cases clearly within their purview. They should not be substantially extended as appellants' position would require here."

See also, *New York, N.H.&H. R.R. Co. v. Lehigh & N.E. R.R. Co.,* 287 F. 2d 678 (2d Cir. 1961), where the Court of Appeals refused to treat as a denial of an injunction the trial court's denial of a stay pending a determination by the Interstate Commerce Commission; and *Day v. Pennsylvania R.R. Co.,* 243 F. 2d 485 (3d Cir. 1957) where the court refused to treat as an injunction the staying of all proceedings pending a decision on related cases by the National Railroad Adjustment Board.

Manifestly then, the holding in *Carey v. Carter, supra,* opposes both the express language of Rule 52 and the weight of judicial authority. And as illustrated by the above cases, its logical effect is to convert every decision denying or granting a motion which would in any way stay the proceedings (*e.g.*, a reference to a master) into the denying or granting of an interlocutory injunction. Such a result, we submit, would be in complete derogation of Rule 52.

Secondly, since the material facts are not in dispute, findings were unnecessary. The evidence is uncontradicted that at no time did Appellees refuse to arbitrate, repudiate the arbitration clause specifically, deny the validity of the contract, or in any other way default in proceeding with arbitration. There being no conflict on these points, findings are neither useful nor necessary. As this Court has noted in *Yanish v. Barber,* 232 F. 2d 939, 947 (9th Cir. 1956):

> "But not every case, where there is a failure to make findings must be sent back to the district court. 'The fact that the district judge made no findings and announced no conclusions upon this issue, does not require remand, since the record is complete'. . . .
>
> Moore's Federal Practice (2d Ed.) Vol. 5, states at p. 2662, 'The failure of the trial court to comply with Rule 52, while characterized as a dereliction of duty does not demand a reversal "if a full understanding of the question presented may be had without the aid of separate findings."' quoting from Shellman v. Shellman, 1938, 68 App.D.C. 197, 95 F.2d 108, 109, and citing cases.
>
> A recognized exception to the general rule, requiring a case to be sent back for lack of findings, is where '* * * the record considered as a whole does not present a genuine issue as to any material fact * * *' . . . So when the facts are undisputed, though no finding is made, the case need not be remanded. . . .
>
> 'In the review of judicial proceedings the rule is well settled that, if the decision below is correct, it must be affirmed, although the lower court re-

lied upon a wrong ground or gave a wrong reason.' " (Citations omitted).

Accord, *Graham v. United States,* 243 F. 2d 919, 923 (9th Cir. 1957);

Urbain v. Knapp Brothers Manufacturing Co., 217 F. 2d 810, 816 (6th Cir. 1954) (Injunction).

Furthermore, since the issue of total breach must await the determination of the sufficiency of water, it would have been premature and even error on the part of the trial court to have found whether or not Appellees had repudiated or abandoned the contract.

Thirdly, the District Court did make sufficient findings of fact. In its Order, the court stated:

> ". . . that defendant and third party plaintiff C. W. MURCHISON, and third party defendant SIMI VALLEY DEVELOPMENT COMPANY, duly and timely move the Court for its order staying proceedings pending arbitration of said issue . . . and that neither of them is, in default or otherwise precluded from proceeding with arbitration, and that the present case is one which is otherwise proper for arbitration. . . ."

We submit that the above finding fulfills the test set forth by the advisory committee to the Federal Rules of Civil Procedure:

> ". . . the judge need only make brief, definite, pertinent findings and conclusions upon the contested matter; there is no necessity for over-elaboration of detail or particularization of facts." Reprinted in 5 Moore, *Federal Practice* Par. 52.01, p. 2606 (2d ed. 1966).

Moreover, even if the issue of repudiation generally were material to this appeal, an appropriate finding has already been made by the trial court in the former trial where substantially the same evidence was introduced. The court stated there:

> "At no time, however, prior to or after the date of the consummation of the purchase of the lands from plaintiffs did defendants, or either of them, or anyone acting in their behalf, repudiate said agreement." [Former C. T. 355; See also former R. T. 255, 418].

VII.

The District Court Did Not Err in Concluding That the Defendants Were Not in Default.

Appellants' final attack on the order below is obviously based on a misapprehension by them of the District Court's conclusion. When the court concluded that neither Appellee was in default, the court was not referring to the performance or non-performance by Appellees of their contractual duties. Rather, the court was referring to the manner in which Appellees had proceeded with arbitration. This is clearly indicated by the full wording of the order:

> "Defendant and third party plaintiff MURCHISON and third party defendant SIMI VALLEY DEVELOPMENT COMPANY are not, and that neither of them is, in default or otherwise precluded *from proceeding with arbitration*. . . ." (Emphasis added).

This language is obviously based on the statutory criteria which requires arbitration when "the applicant for the stay is not in default in proceeding with such arbitration." Calif. Code of Civ. Proc. §1284 (before 1961 amendment).

Thus, it is respectfully submitted, the order was proper.

Conclusion.

For the reasons hereinabove set forth, the Order appealed from should be affirmed.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

STUART L. KADISON